

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, and
STATE OF ARIZONA,
by and through its Attorney General Grant Woods.

Plaintiffs,

Civil No. 94-1793 PHXPGR

vs.

Entered: May 19, 1995

DELTA DENTAL PLAN OF
ARIZONA, INC., AN ARIZONA
CORPORATION,

Defendant.

SECOND AMENDED FINAL JUDGMENT

WHEREAS, Plaintiffs, United States of America and State of Arizona, through their respective attorneys, filed their Complaint on August 30, 1994, alleging violations of the Sherman Act, 15 U.S.C. § 1 and the Uniform Arizona Antitrust Act, A.R.S. § 44-1402;

WHEREAS, the Defendant denies liability;

WHEREAS, there has been no determination by the Court that a violation of law has occurred;

WHEREAS, the Plaintiffs and Defendant, desiring to resolve their disputes without trial or adjudication of any issue of law or fact, have entered into a Settlement Agreement dated as of August 25, 1994, in which they have provided for the entry of this Final Judgment;

WHEREAS, this Final Judgment shall not be evidence against or

an admission by any party with respect to any issue of fact or law; and

WHEREAS, this Final Judgment is filed in accordance with the terms of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, and is a consent judgment as that term is used in 15 U.S.C. § 16(a);

NOW THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, it is

hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of each of the parties consenting hereto. The Court has jurisdiction over Count Two of the Complaint pursuant to 28 U.S.C. § 1367(a). The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, 15 U.S.C. § 1, and under A.R.S. § 44-1402.

II.

DEFINITIONS

As used herein, the term:

- (A) "Defendant" means Delta Dental Plan of Arizona, Inc., an Arizona Corporation;
- (B) "Final Judgment" means this Second Amended Final Judgment;
- (C) "Most Favored Nation Clause" or "MFN" means those

provisions in the Defendant's participating dentist agreements that require that the participating dentist's usual and customary fee be the lowest fee charged or offered by that dentist to, or received from, any person or dental plan;

(D) "Participating Dentist Agreement" means the Delta Dental Participating Dentist Agreement and Confidential Fee Listing document by which Defendant contracts with dentists in the State of Arizona including all versions, amendments and additions thereto in effect at any time since January 1, 1990 and during the term of this Final Judgment.

III.

APPLICABILITY

(A) This Final Judgment applies to the Defendant and to the Defendant's officers, employees, members acting as corporate policy makers, directors, successors, assigns, subsidiaries, divisions and any other organizational units of any kind, and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise. Because the Defendant has previously mailed copies of the Final Judgment dated December 12, 1994, to each dentist who was a member as of January 1, 1993, the Defendant is relieved of the obligation to mail this Final Judgment to those same dentists.

(B) Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV.

INJUNCTION

(A) Within the State of Arizona, Defendant and its members are enjoined and restrained from any and all of the following conduct:

- (1) Maintaining, adopting, or enforcing an MFN or similar provision in participating dentist agreements, in corporate by-laws, in rules or regulations, or by any other means or methods;
- (2) Demanding information from dentists about their participation with any person or other dental plan;
- (3) Examining, auditing, or monitoring the fees a dentist charges to any other dental plan or to any person other than a Delta Dental Plan participant;
- (4) Sending written communication to dentists regarding the fees dentists charge

to persons or dental plans other than Defendant's;

(5) Requiring any dentist to identify the dental plans with which he or she participates;

(6) Seeking any vote of dentists on the levels of reimbursement Defendant is to pay to its dentists;

(7) Terminating, or discriminating or retaliating against, any dentist because he or she offers discounted fees to any person or dental plan;

(8) Differentiating between dentists in payment or other treatment based on a dentist's discounting of fees; or

(9) Taking any other action, directly or indirectly, to coerce any dentist to refrain from offering discount fees to any person or dental plan within the State of Arizona or to refrain from participating in any dental plan, or to discourage any dentist from offering discount fees or participating in any dental plan.

However, nothing contained in this Final Judgment shall restrict Defendant from examining, auditing or monitoring fees a dentist charges to Defendant, and taking appropriate action, where there is good cause to believe that a participating dentist may have engaged in impermissible "irregularities in billing" as defined by A.R.S. § 32-1201.11.

(B) The following underlined language and all similar provisions of the Confidential Fee Lasting and Participating Dentist Agreement shall be null and void and Defendant shall be entitled to no benefit from it, direct or indirect, prospective or retroactive:

Confidential Fee Listing

USUAL: A "usual fee" for a patient is a fee charged or offered and intended to be collected by an individual dentist or a group of dentists;--i.e. -his/her own usual fee. However, if a dentist or group of dentists charge a lower fee to patients who are members of any other individual or group dental care program for the same or similar service or procedure, the "usual fee" shall be deemed to be the lowest fee charged or offered and received as payment in full.

Participating Dentist Agreement

5. I agree to charge Delta Dental my usual fees charged to all my other patients or the amount accepted as payment in full, whichever is less,, for services rendered to Delta Dental's covered patients, and agree to accept Delta Dental's determination of reasonable fees for any procedure as full satisfaction of my fee where my usual fee for such services is determined to be in *excess* of the 90th percentile or the customary range of charges made by dentists of similar training for the same service(s) within the same geographic area as determined by Delta Dental.

(C) Defendant shall, within fifteen (15) days of the date of the Settlement Agreement, mail a letter to all participating dentists containing the language set forth in the Settlement Agreement, and shall certify to the Plaintiffs in writing, within five (5) days of mailing, that the letter was sent.

(D) No later than thirty (30) days from the date of entry of this Final Judgment, Defendant shall pay to the State of Arizona Attorney General's Antitrust Revolving Fund an amount to be agreed upon by the parties.

(E) Defendant shall comply in all respects with all provisions of the Settlement Agreement dated August 25, 1994.

V.

RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, modify it on the basis of changed circumstances, terminate any of its provisions, enforce compliance, and punish violations of its provisions.

Nothing in this provision shall give standing to any person not a party to this Final Judgment to seek any relief related to it.

VI.

ACCESS TO INFORMATION

For the purposes of determining or securing compliance with the Final Judgment, Defendant agrees that from time to time;

(A) Duly authorized representatives of the United States, upon written request of the Assistant Attorney General in charge of the Antitrust Division, or the Attorney General of the State of Arizona, upon written request of the Attorney General, and on reasonable notice to Defendant, shall be permitted, subject to any legally recognized privilege, access, during office hours, to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of Defendant relating to any matters contained in this Final Judgment; and

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, or the Attorney General of the State of Arizona, it shall submit such written reports, under oath if requested, with respect to any of the matters contained in the Final Judgment.

The parties agree that Defendant shall have the right to be represented by counsel in any such process.

Any information provided to the Plaintiffs under this section of the Final Judgment shall be kept confidential by the Plaintiffs and shall not be disclosed to third parties except as necessary to enforce the Final Judgment or as otherwise previously agreed or required by law.

VII.

TERM

This Final Judgment shall expire five years from the date of its entry.

VIII.

PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

DATED this [19th] day of [May], 1995

/s/
UNITED STATES DISTRICT JUDGE